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In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

STATE OF NEW JERSEY

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether federal agencies have authority to require federal grant-in-aid recipients to repay amounts that have been administratively determined to have been misspent, and to collect such amounts by administrative offset, when the governing grant statute does not explicitly provide such authority.

2. If not, whether the Education Amendments of 1978 authorize the Secretary of Education to take such administrative actions with regard to audit disputes pending when the Amendments became effective.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 662 F.2d 208. The decisions of the Education Appeal Board (Pet. App. 31a-87a) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27a-28a) was entered on October 13, 1981, and a petition for rehearing was denied on December 17, 1981 (Pet. App. 29a-30a). On March 8, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to April 16, 1982 and, on April 6, 1982, he further extended

the time for filing a petition to and including May 16, 1982. The petition was filed on that date and was granted on October 4, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Claims Collection Act of 1966, 31 U.S.C. 952, the regulations issued thereunder, 4 C.F.R. Parts 101-102, Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. V) 2701 *et seq.*, and the General Education Provisions Act, 20 U.S.C. (Supp. V) 1234 *et seq.*, are reprinted in the Appendix, *infra*, 1a-7a.

STATEMENT

1. This case concerns the authority of federal agencies to recoup unauthorized expenditures under grant-in-aid statutes. Congressionally created grant programs have become a major vehicle for the implementation of fundamental national goals in areas as varied as education, housing, health, transportation, social welfare and environmental protection. Growth in the use of this device has aptly been characterized as "exponential":[1] in 1972, there were 500 federal grant programs; by 1980, 57 federal agencies administered 1123 programs.[2] It has been estimated that by 1979 the federal government was participating in as many as 300,000 grant agreements each year. R. Cappelli, *Rights and Remedies Under Federal Grants* 17 (1979).[3]

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[1] Catz, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*, 59 Wash. U.L.Q. 1067 (1982).

[2] Compare Wallick & Montalto, *Symbiosis or Domination: Rights and Remedies Under Grant-Type Assistance Programs*, 46 Geo. Wash. L. Rev. 159, 164 n.21 (1978), with Office of Management and Budget, *1980 Catalog of Federal Domestic Assistance* 11 (1980).

[3] In dollar amounts as well, federal grant-in-aid programs have expanded tremendously. In 1937, grant expenditures totalled ap-

While the vast array of assistance programs makes precise definition difficult, all grant programs possess certain common attributes. All grants constitute an award of assistance authorized by statute to meet an express congressionally-recognized need.[4] Thus, the term "federal grant" or "grant-in-aid" is used to apply to any disbursement of monies or property by the federal government to support programs that benefit the public and are carried out by any nonfederal recipient, ranging from a state government to a private individual.[5] Because the purpose of a grant is to implement some congressionally-determined public policy, every grant has express goals and limiting terms and conditions with which each grantee must comply.[6]

Generally, an applicant for a grant must submit a detailed proposal or plan outlining the methods for accomplishing the general goals and purposes of the federal program. In return for the government's providing the grantee with money or property, the grantee must agree, upon the acceptance of the grant, to use it only for the program's legislated objectives, in accordance with the

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proximately $296 million. By 1950, the amount reached approximately $2.2 billion. By 1960, more than $7 billion (or 7.6% of the federal budget) was spent on grant programs. Office of Management and Budget, *Special Analysis H; Federal Aid to State and Local Governments, reprinted in Special Analysis, Budget of the United States Government Fiscal Year 1979*, at 175 (1979); Advisory Commission on Intergovernmental Relations, II *Significant Features of Fiscal Federalism, 1976-1977*, at 55, Table 38 (1977) Report M-110. And in 1981, the total grant outlay was estimated to be more than $125 billion. See Office of Management and Budget, *Special Analysis H: Federal Aid to the State and Local Governments, reprinted in Special Analysis, Budget of the United States Government Fiscal Year 1981*, at 239 (1981); Catz, *supra*, 59 Wash. U.L.Q. at 1069.

[4] Mason, *Current Trends in Federal Grant Law—Fiscal Year 1978*, 35 Fed. B.J. 164, 166 (1976).

[5] See Federal Grant and Cooperative Agreement Act of 1977, 41 U.S.C. (Supp. IV) 501 *et seq.* and Section 504(1).

[6] Catz, *supra*, 59 Wash. U.L.Q. at 1076.

agency's administrative rules. Cappelli, *supra*, at 47-48 n.4. The characteristic feature of the grant-in-aid funding technique lies in the voluntary acceptance of obligations by otherwise autonomous grantees in exchange for federal money.

Virtually all grant agreements require the grantee to submit to regular agency audits, and to maintain and submit fiscal and program records and reports, to enable the agency to determine whether federal funds have been spent in accordance with the purposes for which they were intended. Cappelli, *supra*, at 47-51. See, *e.g.*, 42 U.S.C. 1393(5). In addition to requirements aimed at ensuring that grant funds are properly spent and accounted for, there are additional "programmatic" conditions with which a grantee must comply. These obviously differ from program to program; several, however, appear with great frequency. One is a "matching" requirement, imposing a duty on the grantee to provide a certain share of total program costs, generally statutorily established. Another is a proscription against the grantee's lowering any fiscal support it has provided for the project before receiving federal funds. Cappelli, *supra*, at 48-49. Unlike the matching conditions, under which the grantee loses only the federal funds it fails to match, maintenance of effort requirements ordinarily must be satisfied by the grantee in order to receive any part of the particular grant. See, *e.g.*, 42 U.S.C. 1397b(c)(1) (Social Security Act).

A salient feature of the grant phenomenon is congressional reliance on the executive branch for implementation. Invariably the congressional policy to be advanced by a particular grant statute is stated in broad general terms, necessarily requiring agency flexibility and experimentation in program implementation and structure. Congress has, almost without exception, delegated to the federal agency administering the grant-in-aid program the broad authority to make all rules and regulations necessary for the effective and efficient accomplishment of the national objectives and purposes set forth in the enabling legislation.

To handle the numerous grant disputes inevitably engendered by the complexity and the size of grant programs, federal agencies have established agency dispute resolution mechanisms.[7] Some grant-enabling statutes themselves expressly provide for notice, adjudicatory hearing and appeal rights.[8] In most grant programs in which Congress has utilized a formula device for distributing funds among the states, it has explicitly provided that the grantee is entitled to a hearing before any noncompliance actions are taken.[9] In addition, many agencies—including almost all of the larger grantors—have established by regulation appeal mechanisms that provide substantial protections for the interests of grantees.[10]

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[7] See, *e.g.*, Department of Health and Human Services grant appeal regulations, 45 C.F.R. 16.1-16.23; Environmental Protection Agency grant appeal regulations, 40 C.F.R. 30.100-30.1150; Department of Labor grant appeal regulations, 20 C.F.R. 676.81-676.93 (1980).

[8] See, *e.g.*, 42 U.S.C. (& Supp. IV) 5301 *et seq.* (Omnibus Crime Control and Safe Streets Act of 1968); 20 U.S.C. (Supp. V) 1234 *et seq.* (General Education Provisions Act, as amended by the Education Amendments of 1978).

[9] See, *e.g.*, 42 U.S.C. (& Supp. IV) 246(g)(3) (Public Health Service Act); 42 U.S.C. 707 (Social Security Act); 42 U.S.C. (Supp. IV) 3027(d) (Older Americans Act of 1965); 16 U.S.C. 1456b(d) (Coastal Zone Management Improvement Act of 1980); 29 U.S.C. 667(f) (Occupational Safety and Health Act of 1970); and 42 U.S.C. (Supp. IV) 7405(e) (Clean Air Act Amendments of 1977).

[10] Grant related administrative appeal and dispute resolution procedures take various forms, ranging from formally established administrative tribunals that make adjudications after evidentary hearings to informal efforts to mediate disputes. Catz, *supra*, at 1127-1129. Several of the larger grantor agencies have developed agency-wide grant appeal boards. These boards are staffed with impartial agency decision-makers and are governed by detailed rules of procedure that, at a minimum, assure development of an adjudicatory record. See, *e.g.*, 45 C.F.R. 16.1-16.23 (Department of Health and Human Services grant appeal board).

2. Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. (Supp. V) 2701 *et seq.*,[11] was enacted to provide federal funding to expand and improve programs "which contribute particularly to meeting the special educational needs of educationally deprived children" in areas where there are high concentrations of children from low-income families. 20 U.S.C. (Supp. V) 2701. Title I funds are thus targeted to a specific group of children—educationally deprived children in low-income areas—and are to be used to address their "special needs" by supplementing their regular school programs. The Secretary of Education (the Secretary) acts through state educational agencies (SEAs) to distribute Title I funds to local educational agencies (LEAs), which provide the supplemental programs. The statutory scheme is carefully constructed to ensure that the funds appropriated are actually expended for the benefit of the targeted group: the school attendance areas and children in those areas meeting specific statutory criteria. 20 U.S.C. 241e; 20 U.S.C. (Supp. V) 2732, 2733, 2736, 2737. Similarly, Title I regulations have been carefully constructed to ensure that only eligible children receive Title I services and that Title I funds are not used to provide general aid to schools or to replace state and local funds that would otherwise have been expended for participating children. See, *e.g.*, 45 C.F.R. 116.17(d),(f),(g),(h) (1974); 34 C.F.R. Part 201.

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[11] Title I has been repeatedly and extensively revised since its original enactment (Pet. App. 2a n.2). The Title I statute and regulations in effect during Fiscal Years 1971-1973, the years in which the funds in issue were misspent, are set forth in 20 U.S.C. 241a *et seq.* and 45 C.F.R. Part 116 (1974). The Title I statute was amended and reorganized in the Education Amendments of 1978 (Pub. L. No. 95-561, 20 U.S.C. (Supp. V) 2701 *et seq.*). Furthermore, as of July 1, 1982, the Title I program was superseded by Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA) (Pub. L. No. 97-35, 95 Stat. 463). The enactment of the ECIA, however, does not affect the issues involved in this case.

In order to participate in the Title I program, an SEA must assure the Department of Education that Title I funds will be expended only for programs that meet all federal statutory and regulatory requirements and have been approved by the SEA. 20 U.S.C. 241f(a)(1). An LEA may only receive Title I funds from the SEA on the basis of a project application in which the LEA describes how the funds will be expended and provides satisfactory assurances that it will comply with the statutory requirements. See 20 U.S.C. 241e(a). The total amount of funds that an LEA may receive under the Title I program is determined by a formula based on the number of children from low-income families in the area served by the LEA and the state per pupil expenditure. 20 U.S.C. 241c.

By statute, Title I payments may be made either in advance or by reimbursement, with necessary adjustments for overpayments or underpayments (20 U.S.C. 1232d; 20 U.S.C. (Supp. V) 1226a-1, 2841. However, states participating in the Title I program normally receive payment in advance under a letter of credit system.[12] Pursuant thereto, the Department authorizes the SEA to draw Title I funds from the Treasury during the fiscal year, generally not less frequently than monthly, based upon its projections of the cost of providing services for that period. The SEA draws down

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[12] The Department utilizes two types of advance payment systems—"advance by Treasury check" and "letter of credit". The preferred method of payment is the letter of credit system, which is used when certain conditions are met. These conditions relate to the extent of the relationship between the grantee and the Department, the adequacy of the grantee's financial management system and the grantee's "willingness and ability to maintain procedures that minimize the time elapsing between the transfer of funds from the Treasury and their disbursement by the grantee." 34 C.F.R. 74.93(a); see also 31 C.F.R. Part 205. Under both types of advance payment systems, the grantee must minimize the time elapsing between its receipt and disbursement of federal funds. See 34 C.F.R. 74.61(e), 74.92.

its funds under the letter of credit system by submitting payment vouchers through its local commercial bank to a Federal Reserve Bank. The SEA then is able to make Title I payments to LEAs in a similar fashion in advance of actual program expenditures.[13]

In the event an SEA has failed "to comply substantially with any assurance" it was required to give that it would expend funds consistently with statutory requirements, the Department is required to withhold future Title I payments "until [the Secretary] is satisfied that there is no longer any such failure to comply." 20 U.S.C. 241j.

In addition, in order to ensure that Title I funds are being properly expended in accordance with applicable statutory and regulatory requirements, Congress has required the Secretary to conduct post-expenditure audits. 20 U.S.C. 1232c. See also 5 U.S.C. (Supp. V), App. at 378-383; 20 U.S.C. (Supp. V) 2835. If an audit discloses that funds have been misspent, the Department demands restoration of the misspent funds. Demand for repayment is made in accordance with the government-wide Federal Claims Collection Standards (4 C.F.R. 102.2), which provide that if the grantee is unwilling or unable to repay the debt, the amount of the unauthorized payments may be offset against current or prospective grant disbursements. 4 C.F.R. 102.3. The offset remedy is only used, however, if it does not impair the current operation of any federal grant program. See 34 C.F.R. 74.95(a). Audits of Title I programs have been conducted continuously since the late 1960's, and Congress recognized as early as 1970 that misspent Title I funds discovered during these audits must be refunded

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[13] Under the reimbursement payment system, grantees receive payment by check after program expenditures have been incurred. The grantee normally submits to the Department its requests for reimbursements monthly and is paid within 30 days after receipt of a proper request for reimbursement. See 34 C.F.R. 74.96(b).

to the federal government. S. Rep. No. 91-634, 91st Cong., 2d Sess. 83-84 (1970).

In light of the substantial number of Title I audits being conducted by the early 1970's, the Commissioner of Education in the United States Office of Education (now, the Department of Education)[14] administratively established the Title I Audit Hearing Board in 1972 "for the purpose of reviewing and providing hearings upon final audit determinations made in the administration of title I of the Elementary and Secondary Education Act programs by the Office of Education." 37 Fed. Reg. 23002 (1972). The Commissioner explained that the "pendency of a substantial number of audit reports and determinations (some involving relatively large amounts of funds) under title I * * * [made it] necessary and appropriate that a procedure for finally resolving these pending audit matters be established" (*ibid.*).

In the Education Amendments of 1978, Congress mandated the establishment of the Education Appeal Board (EAB) to hear a variety of cases, including state appeals from Title I audit determinations. 20 U.S.C. (Supp. V) 1234. The EAB was intended to "build upon the existing Title I Audit Hearing Board" and expand its jurisdiction to include other federal education programs. H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 141 (1978). The Secretary of Education, pursuant to the specific statutory authority in 20 U.S.C. (Supp. V) 1234(f), accordingly designated the existing Title I Audit Hearing Board to be the EAB and transferred the

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[14] On May 4, 1980, the Department of Education replaced the Office of Education as the federal agency responsible for the Title I program. See 20 U.S.C. (Supp. V) 3411. Consequently, as of that date, the Secretary of Education assumed the responsibilities and authorities that previously were exercised by the Commissioner of Education. See 20 U.S.C. (Supp. V) 3441.

31 pending cases to the EAB. See 44 Fed. Reg. 30528-30537, 43807 (1979).[15]

3. Respondents, the State of New Jersey and the Commonwealth of Pennsylvania, have participated as grantees in the Title I program since its inception in 1965. In the early 1970's the Department of Health, Education, and Welfare Audit Agency (HEWAA) performed separate audits of the state programs for fiscal years 1971-1973 (New Jersey) and 1968-1973 (Pennsylvania). In its final audit reports, issued in 1975, HEWAA found that both States had misapplied substantial sums of federal Title I monies during the periods under investigation (J.A. 14-15 (New Jersey); 59 Pennsylvania)). After soliciting responses from the States, the Deputy Commissioner for Elementary and Secondary Education in the Office of Education[16] issued final determination letters sustaining the audit findings and ordering the States to refund the amounts determined to have been misspent (J.A. 137-143 (New Jersey); 144-165 (Pennsylvania)).

Both states filed applications for review with the Title I Audit Hearing Board (J.A. 166-199 (New Jersey); 200-202 (Pennsylvania)). After extensive administrative hearings, the successor EAB[17] in February 1980 concluded that New Jersey "should make * * * payment [totaling $1,031,304] to the Office of Education" (Pet. App. 57a); in May 1980 it similarly concluded that Pennsylvania should submit payment in the amount of

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[15] The current regulations governing procedures before the EAB are set forth at 34 C.F.R. Part 78.

[16] The Deputy Commissioner for Elementary and Secondary Education was replaced by the Assistant Secretary for Elementary and Secondary Education when the Department of Education was created in 1980 (see note 14, *supra*).

[17] When the EAB replaced the Title I Audit Hearing Board on June 29, 1979, the appeals filed by New Jersey and Pennsylvania were among those over which it assumed jurisdiction (see pages 9-10, *supra*).

$422,424.29 to the Department of Education (*id.* at 86a). The Secretary declined to review the decisions and, accordingly, after the period for comment and review, the Board's decisions became the final decisions of the Department (*id.* at 88a-91a).[18] Each State was informed that appropriate officials "will be in touch with you at an early date to discuss the method of repayment" (*id.* at 88a, 90a).[19]

Respondents thereupon filed separate petitions for review in the United States Court of Appeals for the Third Circuit. See 20 U.S.C. (Supp. V) 1234d, 2851. The States contended, inter alia, that the Secretary lacked both statutory authority and a common law right to recoup administratively illegally expended Title I funds received by a state prior to the Education Amendments of 1978.

The court of appeals agreed; on the basis of a consolidated decision, it granted the petitions and remanded to the agency with instructions to vacate the orders requiring payment (Pet. App. 1a-26a). First, the court found

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[18] The audit findings against New Jersey and Pennsylvania, sustained by the EAB and the Secretary, were based on the States' failure to comply with basic statutory and regulatory requirements critical to the proper operation of Title I programs. New Jersey and Pennsylvania improperly approved LEA applications for the use of Title I funds in school attendance areas that did not contain sufficient percentages or numbers of children from low-income families, in violation of 20 U.S.C. 241e(a)(1)(A) and 45 C.F.R. 116.17(d) (1974) (Pet. App. 31a-87a). In the Pennsylvania case, the Secretary also determined that Title I funds had been expended improperly in two LEAs for general aid purposes, rather than for the special educational needs of eligible educationally deprived children, in violation of 20 U.S.C. 241e(a)(1)(A) and 45 C.F.R. 116.17(g) (1974) (Pet. App. 58a-87a). A violation of either of these two types of requirements defeats the fundamental purpose of the Title I program: to provide special educational services for educationally deprived children in low-income areas.

[19] No such discussions have yet taken place. Recoupment in accordance with the Federal Claims Collection Standards (4 C.F.R. Part 102) has been postponed pending the outcome of this litigation. See 20 U.S.C. (Supp. V) 1234a(e).

(*id.* at 12a-14a) that the Department of Education lacked specific statutory authority to order the repayment of these misspent funds because the only express authorization to recoup was provided in the 1978 Amendments to Title I (20 U.S.C. (Supp. V) 2835(b); see also 20 U.S.C. (Supp. V) 1234a(e)). Relying on the "overarching principle" of *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981)—that "the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant"—the court held that the 1978 statute could not be applied to funds misspent prior to its effective date (Pet. App. 14a).

Second, although recognizing that the government may resort to the same common law remedies—including setoffs—as private contractors, the court stated (without deciding the issue) that these remedies may not survive where a statutory remedy is provided (Pet. App. 21a). However, the court concluded, even if such a common law remedy survived here, the "advance-funding" method of distributing Title I money "lends itself to enforcement of that right only by an action in a court of competent jurisdiction" (*ibid.*). The court accordingly distinguished this case from *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976), which upheld the common law right of the Department of Health, Education, and Welfare to recover unauthorized Medicare payments by setoff. The court below explained that the use of a setoff in a reimbursement program such as Medicare would not prejudice the intended beneficiaries of the program, whereas it would have such an effect in an advance-funded program such as Title I, and was therefore proscribed (Pet. App. 21a-22a). Thus, the court concluded, agencies administering advance-funded grants cannot administratively enforce a common law right of setoff, even if such a right exists (*id.* at 24a-25a).

SUMMARY OF ARGUMENT

The federal government has an inherent right to recover monies improperly paid out, and it may exercise that right without resort to a court by offsetting the amount against sums otherwise due to the recipient. This right of recoupment is particularly appropriate in the grant context, because the grantee, like a contracting party, agrees to the terms of the grant as a condition of the receipt of federal funds. If a federal agency determines that the grant terms have not in fact been observed, that condition has not been satisfied, and the grantee has no right to retain the funds. Absent any showing that the administrative procedures by which the agency reached its decision to recoup were unfair or otherwise inadequate, the grantee is entitled only to judicial review of that agency decision to assure that it is not arbitrary or capricious.

The court of appeals nevertheless concluded that the Secretary of Education could not recoup funds administratively determined to have been expended by the respondents inconsistently with the terms of their Title I grants. That conclusion was based in part on concern that an administrative setoff would adversely affect the intended beneficiaries of the Title I program. But that concern overlooks the existence of several available collection methods that protect the rights of the intended beneficiaries. The court's suggestion that audit disputes should be resolved in the first instance in judicial proceedings indicates that it did not intend to absolve respondents of all liability, but that suggestion is impractical in light of the complexity and number of audit disputes.

The inherent right of administrative agencies to recoup misspent grant funds may, of course, be abrogated by express statutory language withdrawing that right. Instead of any such withdrawal, however, Congress has consistently legislated on the assumption that such a right exists; a number of statutes have been enacted to

facilitate and encourage the exercise of that inherent right. The Federal Claims Collection Act of 1966 required the promulgation of government-wide regulatory standards governing administrative efforts to collect claims arising out of agency activities, and those regulations specifically contemplate administrative determinations of liability followed, if necessary, by administrative recoupment. Both in the legislative history of the Claims Collection Act and subsequent to its enactment, Congress has repeatedly expressed its understanding that federal agencies have the authority not only to conduct audits to assure that federal grant funds are expended consistently with the terms on which they are received, but also to determine administratively the amounts due as a result of audit disallowances and to collect those sums by appropriate administrative actions, including offsets.

There is nothing in Title I or its legislative history to suggest that Congress did not intend the Secretary to exercise these general administrative responsibilities. The authority to withhold funds from grantees that are not in compliance with the terms of a grant and to disapprove grant applications that do not conform to statutory and regulatory standards are supplemental to, not inconsistent with, the authority to recover audit disallowances. Congress plainly expected federal agencies to withhold payments for purposes that are known at the time to be unauthorized and to recover payments that are subsequently discovered to have been used for unauthorized purposes. The Education Amendments of 1978 provide expressly for the procedures to be followed in administrative recoupment actions, but those changes were intended to clarify pre-existing authority, not to grant an authority previously denied.

In any event, since the audit disallowances at issue here were pending before the agency when the administrative recoupment authority was expressly confirmed in the 1978 Amendments, the Secretary's subsequent final determinations of liability were authorized by the plain terms of the

1978 Amendments. There is no unfairness to respondents in applying to these pending claims the administrative procedures defined in the 1978 Act. Respondents had no vested rights either to retain funds spent in violation of the conditions under which they were received or to any particular procedure for the determination of their liability. Application of the recoupment procedures spelled out in the 1978 Amendments did not impose on respondents any new responsibilities under their grants that they could not have anticipated when they received those grants. Therefore, there are no requirements included here of the kind this Court found improper in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981). Instead, the Secretary is simply attempting to rectify respondents' failure to comply with the unchallenged terms under which the grants were made.

ARGUMENT

I. THE SECRETARY OF EDUCATION, LIKE THE HEADS OF OTHER AGENCIES ADMINISTERING GRANT-IN-AID PROGRAMS, MAY RECOUP GRANT FUNDS ON THE BASIS OF AN AGENCY ADJUDICATION OF AN AUDIT DISALLOWANCE

A. Federal Agencies Have Inherent Authority to Recoup Improper Expenditures Made by Recipients of Grant-in-Aid Funds Without Resort to Judicial Process

1. This Court has long recognized that the federal government possesses a right to recover monies illegally or erroneously paid out. *United States* v. *Carr*, 132 U.S. 644, 650 (1890); *Wisconsin Cent. R.R.* v. *United States*, 164 U.S. 190, 212 (1896). This right exists independent of statute. See *United States* v. *Wurts*, 303 U.S. 414, 416 (1938); *Grand Trunk W. Ry.* v. *United States*, 252 U.S. 112, 121 (1920); *United States* v. *Bank of Metropolis*, 40 U.S. (15 Pet.) 377, 401 (1841). The mode of exercising this right is also well settled; the United States may enforce its right of recoupment by reasonable means

and without resort to litigation, including by deducting or withholding the amount of the overpayment from other sums due to the recipient. See *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 239-240 (1947); *Gratiot* v. *United States*, 40 U.S. (15 Pet.) 336 (1841); *McKnight* v. *United States*, 98 U.S. 179, 186 (1878); *Wisconsin Cent. R.R.* v. *United States*, *supra*. Setoffs against current or subsequent obligations may be used to prevent a recipient of federal funds from retaining monies that are later found to have been unauthorized by the terms and conditions under which they were received. *Wisconsin Cent. R.R.* v. *United States*, *supra*, 164 U.S. at 211-212. See also *United States* v. *Barlow*, 132 U.S. 271, 281-282 (1889).

The government's common law right of recoupment, and its corollary power of recovery by offset, are based on strong considerations of public policy. All money at the disposal of the government belongs to the public. As custodian of these funds, a federal agency has the fundamental obligation to ensure that federal monies are spent only for those purposes permitted by law. Accordingly, if the public's money has been expended in a manner not authorized by statute, the agency's obligation requires it to take administrative actions necessary to prevent an unjust enrichment by the recipient at the expense of the federal treasury. See *United States* v. *Wurts*, *supra*, 303 U.S. at 415-416; *Grand Trunk W. Ry.* v. *United States*, *supra*, 252 U.S. at 120-121; *Wisconsin Cent. R.R.* v. *United States*, *supra*, 164 U.S. at 210-212.

Moreover, the nature of the federal grant process itself implies the authority to recoup grant-in-aid funds awarded on the condition that they will be spent for specific purposes, when the grantee has failed to abide by that condition. In exchange for federal funds, the grant recipient has voluntarily acquiesced in the obligations and conditions of the grant statute and implementing regulations. *King* v. *Smith*, 392 U.S. 309 (1968); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *Harris* v. *McRae*, 448 U.S.

297 (1980). Given the mutuality of obligations assumed, grant-in-aid statutes are considered to be "much in the nature of a contract." *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981). See also *United States* v. *City of San Francisco*, 310 U.S. 16 (1940); *Burke* v. *Southern Pac. R.R.*, 234 U.S. 669 (1914); *McGee* v. *Mathis*, 71 U.S. (4 Wall.) 143 (1866). Under settled principles of contract law, a contracting party may recover monies paid for services that were contracted for, but either never provided or provided in a manner so substantially inconsistent with the terms of the agreement between the parties that the default results in a failure of consideration. It would be "against conscience" to allow the non-performing party to retain monies advanced to induce his performance. *United States* v. *Barlow*, *supra*, 132 U.S. at 282. See also *United States* v. *Bank of Metropolis*, *supra*, 40 U.S. (15 Pet.) at 383.

The use of grant funds for purposes not authorized by Congress constitutes precisely such a non-performance of the terms of the agreement. To permit the grantee to retain the monies so misspent would be contrary to law and public policy. Absent any showing of unfairness to the grantee, an agency charged with implementing the specified purposes of a grant statute retains the inherent right to recoup misappropriated funds by reasonable means, including administrative setoff against amounts due to the grantee.[20]

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[20] Several federal courts of appeals have recognized the common law right of a federal agency to recoup grant funds by administrative offset, without resort to litigation. See *e.g.*, *West Virginia* v. *Secretary of Education*, 667 F.2d 417 (4th Cir. 1981); *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1342 (5th Cir. 1978); *Collins* v. *Donovan*, 661 F.2d 705, 708 (8th Cir. 1981); *Mt. Sinai Hospital* v. *Weinberger*, 517 F.2d 329 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976); *Wilson Clinic & Hospital, Inc.* v. *Blue Cross*, 494 F.2d 50 (4th Cir. 1974); *Hilburn* v. *Buts*, 463 F.2d 1207, 1208 (5th Cir. 1972), cert. denied, 410 U.S. 942 (1973).

Indeed, in many cases the courts have simply assumed the right and have considered only whether the pre-offset procedures accorded

Application of these principles supports the Secretary's actions in the instant case. Title I of the Elementary and Secondary Education Act of 1965 is designed to promote national educational policies, specifically by providing funding to supplement the regular school programs of educationally deprived children in low-income areas. 20 U.S.C. (Supp. V) 2701. The statutory scheme and the implementing regulations are carefully structured to ensure that Title I funds are not used simply to provide general aid to schools, but rather to provide the precisely defined class of eligible children with services they would not otherwise receive. See 20 U.S.C. (Supp. V) 2732, 2733, 2736, 2737; 34 C.F.R. 201.52, 201.70, 201.71, 201.110.

Prior to obtaining Title I funds, New Jersey and Pennsylvania, like all other grantees, submitted assurances that they would spend the federal award only in accordance with statutory and regulatory requirements. 20 U.S.C. 241f(a)(1), 241e(a), 241c. After an elaborate administrative procedure, the Secretary determined, however, that respondents had improperly used Title I funds for children who resided in ineligible school attendance areas and for general aid purposes instead of for special educational needs of eligible children. Rather than serving educationally deprived children in low-income areas, federal payments thus had been utilized to educate children who are not the intended beneficiaries of the program. While such misexpenditures relieved the States of some of their financial burden in the area of education, that relief was accomplished in contravention of congressional intent and at the expense of the intended beneficiaries of the Title I program and of the public treasury. This type of misexpenditure gives rise to the government's inherent right of recoupment. Accordingly, the Secretary was acting well within his authority when he

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requisite due process protections to the grantee. See, *e.g.*, *Atwater* v. *Roudebush*, 452 F. Supp. 623, 627 (N.D. Ill. 1976), and cases there cited.

demanded repayment of the misspent sums. And, if respondents fail to comply with his demands, the Secretary would be entitled to enforce his recoupment right by offsetting the amounts misspent against current or subsequent Title I payments to the States.

Of course, a grantee has a right to object if the agency's resolution process lacks fundamental fairness, or if the ultimate decision itself is arbitrary and capricious. Here, however, there can be no serious dispute that New Jersey and Pennsylvania were granted an ample opportunity to contest the Secretary's assertion that Title I funds were improperly used.[21] Moreover, grantees are protected from arbitrary administrative decisions, because judicial review of the agency's final adverse action is available in the court of appeals under 20 U.S.C. (Supp. V) 2851 and 20 U.S.C. (Supp. V) 1234d.[22]

2. The court of appeals rejected these principles, in part because of a concern that a setoff of the funds due

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[21] In conducting the audit itself, the Department interviewed appropriate officials from the SEA and the affected LEAs. The States submitted extensive comments on both the proposed and final audit reports (J.A. 35-53 (New Jersey); 127-136 (Pennsylvania). Thereafter, the States appealed the decisions in the final determination letter to the Title I Audit Hearing Board (see page 10, *supra*). Extensive Board proceedings were held in each case, including prehearing conferences, an exchange of written interrogatories (New Jersey), prehearing motions (Pennsylvania)). Thereafter, the States appealed the decisions in the final Pennsylvania case included a four-day evidentiary hearing with 18 witnesses, resulting in a 634-page transcript (*id.* at 59a). New Jersey presented oral arguments but did not request an evidentiary hearing (*id.* at 34a-35a). At the completion of these proceedings, both panels of the successor EAB issued detailed written decisions (*id.* at 31a-57a (New Jersey); *id.* at 58a-87a (Pennsylvania)). Subsequent to the Board's decisions both States submitted additional written comments and recommendations to the Secretary. See 34 C.F.R. 78.82.

[22] Where the grant statute itself does not expressly provide for judicial review, a grantee subject to adverse agency action, including disallowance determinations, is entitled to judicial review under the Administrative Procedure Act, 5 U.S.C. 702.

and the filing of briefs (Pet. App. 32a-34a, 59(a)). The

against future grant payments would adversely affect planned services to eligible children, thus further penalizing the intended beneficiaries of the federal program (Pet. App. 21a-22a). The court apparently did not intend to imply that the States had no liability at all for repayment of the misspent funds, but only to hold that the attempt to collect the funds due by administrative action, rather than by a judicial proceeding, was inappropriate.

a. The court's concern that the method of collection following administrative determination of liability would be inequitable overlooked the alternatives available to the Secretary. Recoupment in advance-funded programs need not penalize the intended beneficiaries of the program. Indeed, Department of Education regulations specifically prohibit any recoupment that would impair the accomplishment of the objectives of the grant program (34 C.F.R. 74.95(a)). Direct repayment of the debt by the grantor out of non-federal funds obviously would not impair the aims of the federal grant program. Furthermore, even if the Secretary must collect the debt by administrative offset, there are several methods available to the Secretary for guarding against such impairment. For example, the state may be required, as a condition of receiving the grant against which the setoff is made, to contribute an equivalent amount of state or local funds to maintain operation of the grant program at mandatory levels. Current program operation would not be adversely affected under this type of offset.[18]

Alternatively, the Secretary could exercise his authority (20 U.S.C. (Supp. V) 1226a-1, 2841) to pay the state by reimbursement of funds expended, and then offset

[18] The Office of Management and Budget has directed agencies to establish controls to assure that the collection of disallowed costs from grantees does not reduce the level of benefits in the federal program. Office of Management and Budget, Circular No. A-50 at 8 (Rev. Sept. 29, 1982).

against funds reimbursed to the grantee.[24] Because the grantee would be receiving reduced payments for program expenditures already incurred, there would, under the court of appeals' analysis, be no reduction in program level under this type of offset.[25]

In sum, while impact on program goals and beneficiaries is a valid consideration in determining the methods of repayment, such determination rests within the broad discretion of the agency, subject to judicial review for arbitrariness. In this case, the Secretary of Education has not yet had the opportunity to exercise that discretion. As the notice letter to each State indicated (Pet. App. 88a, 90a), the "method of repayment of the funds in question" remains to be determined after judicial review is completed and the amount of the State's liability established. See also note 19, *supra*. At this stage of the proceedings, therefore, it was inappropriate for the court to assume that the collection of the overpayments would be inconsistent with the statutory purposes of Title I.

b. The court of appeals' suggestion (Pet. App. 23a-25a) that the Secretary might collect misspent funds by suit in federal court indicates that it did not intend to deny the States' liability altogether. But requiring the

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[24] Recoupment could also be made by offset against reimbursements to the state under other federal grant programs. See 4 C.F.R. 102.3.

[25] The court below specifically found that because Medicare is a reimbursement-funded program, offsets under that program would not reduce current program levels and presumably would therefore be permissible. Although "advance" and "reimbursement" funding are theoretically distinct, the practical differences between the two may not be significant. Actual payments under both Medicare and Title I are disbursed in similar fashion—at periodic intervals, generally monthly, throughout the fiscal year—and payments may be withheld at any time during the year for good cause. See pages 7-8, *supra*; *Mt. Sinai Hospital* v. *Weinberger*, *supra*, 517 F.2d at 335. It is thus not at all clear that the effects of recoupment differ in the two circumstances.

government to bring an original action in federal court to recover every audit-related misexpenditure only theoretically protects the Secretary's right of recovery. Such an alternative remedy is neither adequate nor feasible. Not only would it effectively nullify the right from the federal government's standpoint, but it would also seriously erode already strained judicial resources.

Given the vast size of the federal grant effort—both in numbers of programs and administering agencies and in the amount of expenditures—and the fact that most grant statutes contain no express recoupment authorization (see pages 2-5, *supra*), the sheer volume of potential collection suits would, as a practical matter, ensure that only the largest cases would ever result in litigation. Cognizant of this practical reality, grant recipients would be encouraged to resist repayment, thereby postponing the need to repay the amount in dispute and frequently avoiding the need to repay entirely.[26] The end result would be an undermining of the fundamental principle that federal grant funds must be spent according to the conditions of the grant.

In an original action brought by the federal government to recover an audit disallowance, each side would be required to introduce documentary evidence for adjudication by the district court, thereby duplicating the administrative proceedings.[27] The courts would be required to adjudicate de novo complex and often hotly contested agency audit disallowance determinations. These burdens can be avoided by recognizing that the administrative agency charged with implementing the grant pro-

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[26] This windfall to grant recipients, of course, would be at the expense of the aims Congress sought to accomplish in appropriating the monies for the grant program.

[27] The likely result of stripping federal agencies of their administrative enforcement power would be the dismantling of the elaborate dispute resolution mechanisms and appeals boards currently in place, on the ground that they had become futile, and a waste of federal funds and manpower.

grams, and particularly a specially constituted appeals board with expertise in the highly technical audit matters likely to be in issue, is the appropriate forum in which to resolve these disputes in the first instance.

Once audit disallowance disputes have been resolved through an administrative review process, administered by officials with expertise in the substantive matters in dispute, there is an administrative record and a statement of reasons. A grantee aggrieved by the final agency determination may then appeal to federal court, and judicial review can be based on the administrative record that has resulted in sharpening the issues.[28] Agency action can be overturned if the record reveals it was arbitrary or capricious or lacking a rational basis.

In sum, the remedy of administrative recoupment is firmly established as an inherent common law right of the government, and the administrative adjudication upon which it is based enhances and further facilitates judicial review while working no unfairness on grantees.

B. Congress Has Affirmed The Right of Administrative Recoupment

The government's inherent right to recover federal funds from one who has no right to retain them is not barred unless and until Congress has " 'clearly manifested its intention' to raise a statutory barrier." *United States* v. *Wurts*, 303 U.S. 414, 416 (1938), *quoting Grand Trunk W. Ry., supra*, 252 U.S. at 121. See also *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779 (1952).[29] Indeed, the conclusion that the sovereign has

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[28] The absence of a statement of reasons has been found to hamper judicial review. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 417 (1971).

[29] Even where such an intention is explicit, the scope of the common law will be constrained no further than the fair import of the statute's language requires. *United States* v. *Mead*, 426 F.2d 118, 123 (9th Cir. 1970); *United States* v. *Borin*, 209 F.2d 145 (5th Cir.), cert. denied, 348 U.S. 821 (1954).

been denied rights that it could otherwise properly claim will only be "warranted if exacted by the most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 171 (1909); *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).[30] The absence of express administrative recoupment authority in a grant statute (as in Title I before the 1978 Amendments) is not such an unequivocal expression of congressional intent. Cf. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). On the contrary, the lack of express authority in the individual grant statute is more likely to reflect the view of Congress that it was unnecessary to confirm the agency's well-settled power of recoupment.

1. The Federal Claims Collection Act of 1966, 31 U.S.C. 951 *et seq.*, is strong evidence of congressional belief in the existence of such authority, and is itself sufficient to grant the right of recoupment, if an express statutory provision is necessary.[31] Section 3(a) of the Act (31 U.S.C. 952(a)) provides:

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[30] This is particularly the case where, as here, no express statutory authority is required to support the right in the first place. See *Jacquet* v. *Westerfield*, *supra*, 569 F.2d at 1342.

[31] The lower courts have consistently held that the Federal Claims Collection Act provides explicit authority for administrative offset procedures. In many of these cases, the courts have also held that the Act merely embodies common law rights and principles. *American Federation of Government Employees* v. *Nimmo*, 536 F. Supp. 707, 713 (E.D. Va. 1982) (authority of the Veterans Administration to recoup the costs of non-service connected medical care furnished to ineligible veterans); *Collins* v. *Donovan*, 661 F.2d 705, 707 (8th Cir. 1981) (authority of the Secretary of Labor to recoup overpayment of Trade Readjustment Allowance benefits made pursuant to the Trade Act of 1974); *Atwater* v. *Roudebush*, 452 F. Supp. 622, 627 (N.D. Ill. 1976) (Federal Home Administration and Veterans Administration setoffs); *Louisiana* v. *Block*, 531 F.Supp. 118, 122 (M.D. La. 1982) (reduction of state food stamp grants by means of setoff).

> The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

As required by the Act, government-wide regulations have been promulgated jointly by the Attorney General and the Comptroller General.[32] 4 C.F.R. Parts 101-105 (1980) ("Federal Claims Collection Standards").[33] These regulations provide, inter alia (4 C.F.R. 102.1):

> The head of an agency or his designees shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of * * * his agency in accordance with the standards set forth in this chapter.

These mandatory "aggressive" and "timely" agency actions to collect debts expressly include making "written demands * * * upon a debtor" and instituting an "offset * * * in every instance in which this is feasible." 4 C.F.R. 102.2, 102.3.[34] The Department of Education's final dis-

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[32] The Comptroller General is the head of the General Accounting Office (GAO), which was established by Section 301 of the Budget and Accounting Act of 1921 (31 U.S.C. 41), and is independent of the executive departments. It is part of the legislative branch of the Government. I R. Nash & J. Cibinic, *Federal Procurement Law* 19 (3d ed. 1977).

[33] Many agencies, including the Department of Education, have promulgated regulations adopting and supplementing the Federal Claims Collection Act standards. See, *e.g.*, 34 C.F.R. Part 30 (Department of Education); 45 C.F.R. Part 30 (Department of Health and Human Services); 7 C.F.R. 1.52 (Department of Agriculture); 29 C.F.R. 2.6 (Department of Labor).

[34] These regulations are well within the broad authority granted to the Attorney General and the Comptroller General under 31 U.S.C. 952(a) and are consistent with the Federal Claims Collection Act. Moreover, the long established principle that courts should give great

allowance determinations in the instant cases constitute claims of the United States arising out of the activities of the Department of Education. Moreover, offset is "feasible" here because respondents annually receive substantial sums of grant money, well in excess of the misexpended amounts, pursuant to the Title I program. The plain language of the Act and implementing regulations thus authorize, and indeed require, administrative recoupment of the funds disallowed once they have been administratively determined to have been misspent. Specifically, the regulations require a demand for repayment and, where this is unsuccessful, the use of other reasonable administrative methods, such as offsets. Agencies are not expected to litigate all audit disallowance claims—indeed, it is absurd to suggest that Congress intended to require agencies to overpay grantees while simultaneously bringing suit for the amount of the overpayment; rather, agencies are to utilize appropriate administrative collection procedures.[35]

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deference to interpretations of a statute by the agency charged with its implementation is entitled to particular weight here. The Federal Claims Collection Act was in essence an adoption by Congress of a recommendation submitted to that body by the Attorney General (S. Rep. No. 1331, 89th Cong., 2d Sess. 8-9 (1966)). As the moving force behind the Act, the Attorney General can be deemed to be fully aware of its purposes and to have included nothing in his implementing regulations inconsistent therewith.

[35] Congress has recently enacted the Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749) to facilitate government collection of debts owed by private persons—primarily defaults on government loans. S. Rep. No. 97-378, 97th Cong., 2d Sess. 1, 24, 32-33 (1982). Section 10 of that Act (H.R. 4613, 97th Cong., 2d Sess. § 10 (1982)) adds a new Section 5 to the Federal Claims Collection Act, specifically providing that an agency head "may, after attempting to collect a claim from a person under section 3a of this Act [31 U.S.C. 952(a)] collect the claim by means of an administrative offset" if it has been outstanding for 10 years or less and if the person is provided specified procedural protections. Subsection (e) of the new Section 5 provides that, for the purposes of the new Section, "the term 'person' does not include any agency of the United States, or any State or local government." Senator

The legislative history of the Federal Claims Collection Act clearly demonstrates that Congress assumed the existence of agency authority to determine administratively the existence and extent of "claims of the United States for money or property arising out of [agency] activities" (31 U.S.C. 952(a)). The bill proposed by the Department of Justice and adopted by Congress was designed "to ease court congestion and improve and accelerate the disposition of Government claims," primarily by expanding agency authority to settle such claims. See Letter from Attorney General to the Vice President (Mar. 10, 1966) transmitting proposed legislation, *reprinted in* S. Rep. No. 1331, 89th Cong., 2d Sess. 8-9 (1966). At that time, most agencies were expressly precluded by existing law from settling claims for less than their full amount or terminating efforts to collect claims; all claims that could not be successfully collected administratively were thus referred to the Department of Justice for litigation.[36]

The new Act recognized and reaffirmed the series of steps by which the United States had previously attempted

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Percy, its sponsor, explained that subsection (e) was intended to recognize that only *individuals* are entitled to the due process protections provided the debtor in the new Section 5 (128 Cong. Rec. S13260 (daily ed. Oct. 1, 1982)). See *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323, 324 (1966). This reading of the Debt Collection Act of 1982 is consistent with its major purpose, to improve the effectiveness of the government's efforts to recover overdue loans made to individuals. The Act does not speak to the situation with which this case deals.

[36] Congress recognized that administrative determinations of the amounts due, and efforts to collect those amounts, normally precede litigation. In justifying the need for additional authority to terminate or suspend collection efforts on small claims, the Senate Report indicated that "agency collection efforts before referral will reveal that in numerous cases the debtor, at no time, could have paid the debt. * * * [In other cases] if the debt cannot be collected by agency action or for other reasons, the agency c[an] still refer the debt, as it does today, to either the GAO or the Department of Justice." S. Rep. No. 1331, *supra*, at 3-4.

to collect debts—beginning with agency demand for repayment and employment of offsets where feasible. If these administrative efforts proved unsuccessful, referral to the Justice Department for possible litigation could still be made under the Act. Litigation, however, was only to be used as "a last resort," after exhaustion of administrative collection procedures. S. Rep. No. 1331, *supra*, at 3. In the case of certain small claims not exceeding $20,000, the agency was no longer required to pursue collection but could enter into a compromise or settlement agreement when, on balance, it would serve the interests of the United States.

The legislative history makes clear that the administrative authority to recoup and offset (as provided in 31 U.S.C. 952(a)), in contrast to the authority to settle and compromise (as provided in 31 U.S.C. 952(b)), predated passage of the Act. Indeed, various restrictions on agency authority to compromise were included precisely because the newly created compromise authority was in derogation of the agency's duty to make serious efforts to collect all claims and, without express limits, might be exercised too freely with resulting loss of federal revenues. Caution was thus required at the outset of this new experiment. *Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13651 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 23-24 (1966) (statement of Assistant Attorney General John W. Douglas). See also *id.* at 26-28 (exchange between Mr. Douglas and Representatives Grider and Ashmore).

2. On several occasions since passage of the Federal Claims Collection Act, Congress has reaffirmed the duty of all federal agencies to pursue their audit-related collection responsibilities aggressively. Indeed, in light of mounting evidence of substantial audit-related debts owed by grantees (primarily state and local governments), Congress has recently expressed great concern about deficiencies in agency efforts to collect these audit disallowances and has sought ways to improve the quality and effectiveness of

administrative collection procedures. Congressional views are best summarized in a recent report by the House Committee on Government Operations. H.R. Rep. No. 97-727, 97th Cong., 2d Sess. (1982) ("Cong. Report") entitled "Failure of Federal Departments and Agencies to Collect Audit-Related Debts". The Report—the third in a series of related reports beginning in 1979 [37]—criticizes several agencies for their failure to act promptly and aggressively to recover amounts due the government as a result of audit findings (*id.* at 2).[38]

In the Report, the Committee stressed its "long recogni-[tion]" of the importance of effective audit resolution (Cong. Report at 2) and its concern over huge unresolved

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[37] The others are *Failure of Government Departments and Agencies to Follow Up and Resolve Audit Findings*, H.R. Rep. No. 96-279, 96th Cong., 1st Sess. (1979), and *Continued Failure of Departments and Agencies to Take Effective Action on Audit Findings*, H.R. Rep. No. 97-279, 97th Cong., 1st Sess. (1981). These reports urged federal agencies to strengthen their audit resolution systems to ensure that debts are effectively and promptly accounted for and collected.

[38] The Report is based both on hearings and a GAO report: *Departments' and Agencies' Continued Failure to Follow up and Resolve Audit Findings: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 97th Cong., 1st Sess. (1981); Comptroller General, General Accounting Office, *Federal Agencies Negligent in Collecting Debts Arising From Audits* (1982) ("GAO Report").

The 1979 and 1981 House Reports (see note 37, *supra*) were similarly based on hearings and GAO reports. See *Failure of Departments and Agencies to Follow Up on Audit Findings: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. (1979); *Failure to Provide Effective Audits of Federal Grants: Hearings Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 96th Cong., 1st Sess. (1979); Comptroller General, General Accounting Office, *More Effective Action is Needed on Auditors' Findings—Millions Can Be Collected or Saved* (1978); Comptroller General, General Accounting Office, *Disappointing Progress in Improving Systems For Resolving Billions in Audit Findings* (1981).

audit disallowances "in the billions" (*id.* at 7),[39] and reiterated that agencies have "primary responsibility" for effective resolution of such disallowances—which necessarily includes the duty to collect amounts finally found to be due (*id.* at 15). Among the statutory sources of agency authority to recover misspent grant or contract funds, the Committee highlighted the Federal Claims Collection Act, noting that the regulations promulgated thereunder "have the force and effect of law * * * [and] require agencies to take aggressive action to collect amounts due, when feasible, by offsetting future payments to the debtor." *Id.* at 6.[40]

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[39] The GAO Report stated (at 6, 24) that on the basis of an agency survey, as of June 30, 1981, a "grossly understated" estimate of outstanding audit-related debts or amounts misspent by grantees or contractors was $374 million. The report emphasized (at 2) that the grantees involved "are typically State or local government entities or community-based organizations."

[40] The Committee recognized that the Federal Claims Collection Act does not stand alone as statutory support for the right to recoup misspent funds administratively. Even prior to that Act, the Accounting and Auditing Act of 1950 (31 U.S.C. 66a) required the head of each executive agency to establish and maintain systems of accounting and internal controls. See Cong. Report at 6; GAO Report at 3-4. Virtually all agencies administering grant statutes are similarly required to perform audits to ensure that monies are properly expended. See page 4, *supra*. Because the recovery and collection of disallowed costs is but the "final link in the audit resolution chain" (Cong. Report at 5), the right of administrative recoupment has been statutorily authorized for at least as long as agency audits and accounting systems have been required.

More recent expressions of this congressional policy can be found in the Supplemental Appropriations and Rescission Act of 1980 (Pub. L. No. 96-304, 94 Stat. 857), directing agencies for which appropriations are being made to initiate action promptly on all audit findings, and in the Department of Housing and Urban Development-Independent Agencies Appropriation Act of 1981 (Pub. L. No. 96-526, 94 Stat. 3066), requiring agencies to take immediate action to "improve the collection of overdue debts * * * [and] to bill interest on delinquent debts as required by the Federal Claims Collection Standards." In addition, Congress has created offices of Inspector and Auditor General in 13 executive departments and

The Committee blamed administrative failure to collect a significant portion of audit-related debts, in part, on agency violations of the Federal Claims Collection Act. Accordingly, the Committee recommended, inter alia, that "[a]ll claims arising from audit disallowances be collected in accordance with the Federal Claims Collection standards" (Cong. Report at 15, recomm. 5) and that "[a]ny claims involving funds spent in violation of law or ongoing regulations be automatically disallowed. Agencies should not be allowed to waive recovery of any such funds without express legislative direction" (*ibid.*, recomm. 3). Finding that "legitimate grantee appeals were being used to delay payment of grantee debts at a cost of millions of dollars to the Federal Government," the Committee also recommended that agencies charge and collect interest on all audit-related debts (*id.* at 15, recomm. 7).

C. Nothing In Title I Itself Suggests A Congressional Intent To Abrogate The Secretary's Right To Recoup Grant Funds On The Basis Of An Administrative Determination That They Have Been Misspent

1. Respondents argued below that "by providing for the withholding of funds and disapproval of SEA applications, Congress intended to abrogate whatever common-law causes of action the Department may have had" to make administrative recoupments (Pet. App. 20a). But the specification of these methods of assuring compliance with statutory standards falls far short of the explicit statement of congressional intent necessary to deprive the Secretary of his right to recover improperly spent public

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agencies for the purpose of consolidating existing auditing and investigative resources to combat fraud, waste, and abuse in federal expenditures and programs. Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, 5 U.S.C. (Supp. V) App at 399. In support of that Act, Congress noted that "internal auditors nearly always pay their own way many times over by performing audit work that leads to recovery of overpayments from grantees and contractors * * *" S. Rep. No. 95-1071, 95th Cong., 2d Sess. 10, (1978).

funds (see pages 23-24, *supra*). Cf. *Rosado* v. *Wyman*, 397 U.S. 397, 422-423 (1970). In any event, neither the Secretary's power to withhold future funding from a noncomplying grantee (20 U.S.C. 241j) nor his obligation to disapprove grant applications that do not meet statutory requirements (20 U.S.C. 241f(b)) is in any way inconsistent with, or duplicative of, his right to recover funds that have been squandered, in violation of statutory requirements, in the past.

The withholding and disapproval remedies are designed to assure that funds are not allocated to the states under circumstances that indicate they will be misspent. But those remedies only address the situation in which the grantees are seeking the allocation of funds for noncomplying programs. The recoupment remedy, on the other hand, applies to noncompliance discovered *after* the federal moneys have been expended. The two types of remedies are thus entirely complementary: the first prevents payments for improper purposes, while the second permits recovery of sums improperly applied.[41]

2. Nor can congressional actions in amending Title I to include an express requirement that the Secretary recoup funds "finally determined * * * to have been misspent or misapplied" (Section 185(b) of Title I (20 U.S.C. (Supp. V) 2835(b)) be construed as indicating that Congress viewed the agency as lacking prior authority. To the contrary, the pre-1978 Title I statute clearly implies that the Secretary retained the common law right of recoupment; the 1978 Amendments simply provide an explicit procedural framework for the administrative enforcement of rights otherwise implicitly held.

a. The pre-1978 Title I statute authorized the Secretary to conduct audits of state programs to determine whether there had been overpayments or underpayments and to make necessary adjustments in future grant

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[41] Agency recoupment authority under grant statutes with similar explicit enforcement provisions has been sustained. See, *e.g.*, *Mt. Sinai Hospital* v. *Weinberger*, *supra*; *United States* v. *Bellard*, 674 F.2d 330 (5th Cir. 1982); *Jacquet* v. *Westerfield*, *supra*.

awards. 20 U.S.C. 1232c, 1232d.[42] The legislative history demonstrates that this audit authority was meant to include the authority to recover any funds determined to have been misspent as a result of the audits. S. Rep. No. 91-634, 91st Cong., 2d Sess. 83-84 (1970) states:[43]

> Audit reports on title I * * * have been valuable to the committee in its review of that program. The committee notes that exceptions have been taken to certain expenditures of title I during the initial years of the program and, to the extent this committee has reviewed those exceptions, they appear to be well founded. Even though there may be difficulties arising from recovery of improperly used funds, those exceptions must be enforced if the Congress is to carry out its responsibility to the taxpayer.

Additionally, in enacting a five-year statute of limitations in 1974 (20 U.S.C. 884), Congress reiterated its

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[42] The court below stated (Pet. App. 15a) that the Secretary's actions in ordering respondents to repay misspent Title I funds were "very much different" than the offset authority in 20 U.S.C. 1232d. We disagree. If the Secretary has the statutory authority to collect misspent Title I funds by an adjustment in future payments, he certainly can first demand repayment of those funds. See 4 C.F.R. 102.2 (1980).

[43] There is some confusion over whether this piece of legislative history relates to Section 434 (20 U.S.C. 1232c) or Section 435 (20 U.S.C. 1232d) of the General Education Provisions Act. While the text refers to Section 425, 20 U.S.C. (1970 ed.) 1232c (which was renumbered as Section 415 two years later), the court below concluded that this was a typographical error and that the passage was intended to explain Section 424, 20 U.S.C. (1970 ed.) 1232d (Pet. App. 15a-16a). But whichever section is being explicated, the statement itself clearly demonstrates that Congress intended and expected the agency to conduct audits and to recover any misspent Title I funds.

Congress recently has again recognized that agency authority to conduct audits includes the parallel authority to recoup on the basis of administrative adjudication of audit disallowances. See note 40, *supra*.

intent that the agency recover funds improperly expended under Title I. Section 884 provides that "(n)o State or local education agency *shall be liable to refund any payment* * * * if such payment was made more than five years before such agency received final written notice that such payment was unauthorized" (emphasis added). There would have been no need for a statute of limitations unless the agency had the authority to recover misspent funds based on audits of past expenditures. Moreover, the reference in the statute to "refunds" indicates that Congress evidently intended and anticipated that the Secretary would exercise his authority to collect administratively audit disallowances not barred by the statute of limitations.[44]

b. Express statutory authority for administrative recoupment of misspent Title I funds was added by the Education Amendments of 1978. But the fact that Congress grants a power expressly does not negate the existence of the power prior to the express grant. Cf. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). In any event, the legislative history of the 1978 Amendments clearly demonstrates that, rather than creating any new remedy, Congress merely intended to formalize and make certain changes in the already existing administrative mechanism for the recovery of misspent Title I funds. Thus, the 1978 Amendments mandate the establishment of the Education Appeal Board (EAB) with jurisdiction to hear state appeals from Title I audit determinations (20 U.S.C. (Supp. V) 1234). Congress indicated awareness and approval of the predecessor Title I Audit Hearing Board's exercise of this jurisdiction. See,

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[44] The legislative history of 20 U.S.C. 884 shows that Congress was aware of the agency's audit resolution and collection activities. The House Report describes the audit procedures in detail and explains that the agency may not "collect" on an audit exception if final notice of the intention to "collect" is made more than five years after the date of the unauthorized expenditure. H.R. Rep. No. 93-805, 93d Cong., 2d Sess. 78-79 (1974).

e.g., 124 Cong. Rec. H20612 (1978) (remarks of Rep. Corrada):

> [T]he title I, ESEA statute and regulations currently provide for * * * the repayment of misspent funds after an audit or review has been conducted * * *.
>
> The repayment authority following an audit has been used in the last couple of years on a number of occasions, and has been an effective measure to insure some accountability in the title I programs. In the past 2 years, approximately 30 audit determinations have been appealed to the title I Audit Hearing Board, an internal, impartial hearing board to resolve audit determinations disputes between the Office of Education and State educational agencies. Approximately one-third of these cases have reached final resolution and have required repayment.

The House Report accompanying the 1978 Amendments also makes clear that Congress did not believe it was enlarging the pre-existing right of the Secretary to recover misspent Title I funds through an administrative hearing process. Instead, Congress intended simply to clarify and formalize the authority that it viewed the Secretary as already possessing (H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 142 (1978)):

> [N]othing in these provisions [establishing the EAB] should be interpreted as radically changing the present relationship of the Federal Government to the States or to local school districts. These amendments, rather, are meant merely to lay out responsibilities more clearly so that no confusion exists about each governmental levels' respective duties.[45]

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[45] In addition, the House Report states that the new EAB was designed "to build upon the existing Title I Audit Hearing Board" and to expand its jurisdiction to include other federal education programs (*id.* at 141). There is no suggestion that Congress felt that the Title I Audit Hearing Board did not have the power to

Thus, the amendments and their legislative history indicate that Congress assumed that the Department of Education had always had the authority to recoup misspent Title I monies administratively and that Congress approved the remedy. This congressional understanding is entitled to great weight. *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381 (1969).[46]

II. THE ADMINISTRATIVE RECOUPMENT HERE WAS SPECIFICALLY AUTHORIZED BY TITLE I

While the audit disallowance protests in this case were pending, Congress enacted the Education Amendments of 1978. There is no dispute that in that Act Congress explicitly authorized the Secretary to recover administratively all Title I funds that have been finally determined through the audit resolution process to have been misspent by a grantee (20 U.S.C. (Supp. V) 2835(b); 20 U.S.C. (Supp. V) 1234a(e)).[47] These sections are applicable to the

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issue binding decisions in the cases within their original jurisdiction. Indeed, the specific authorization in 20 U.S.C. (Supp. V) 1234(f) of the designation of an existing appeal board to be the EAB obviously contemplates the transfer of pending cases from the existing board, and thus necessarily assumes such jurisdiction.

[46] In 1981, the Senate considered an amendment to an appropriations bill that would have relieved the states of any obligation to repay Title I funds that were misspent before 1978. Although the amendment was ultimately defeated on a point of order (127 Cong. Rec. S5429 (daily ed. May 21, 1981)), the debate further confirmed congressional recognition of the Secretary's pre-1978 exercise of his recoupment authority (*id.* at S5427 (remarks of Sen. DeConcini)). Indeed, one of the objections to the proposed amendment was that the 1978 cutoff date would unfairly "penalize[] those States [like New Jersey] * * * which have in good faith paid back claims and reward[] those States which have delayed" (*id.* at S5428, S5429) (remarks of Sen. Schmitt).).

[47] Section 185(b) of Title I (20 U.S.C. (Supp. V) 2835(b)) provides:

> (b) Audit resolution and repayment.—The Secretary shall adopt procedures to assure timely and appropriate resolution

instant case. Thus, even assuming lack of authority derived elsewhere, the Title I statute has explicitly contained authority to recoup misspent Title I funds administratively since the 1978 Amendments, substantially before the completion of the administrative appeal processes here at issue.

Contrary to the conclusion of the court of appeals, reliance on the authority contained in the 1978 Amendments does not involve any unfair retroactive application of the law.[48] Compare *West Virginia* v. *Secretary of Education*, *supra*, 667 F.2d at 419. It is well established that a federal court or administrative agency must "apply the law in effect at the time it renders its decision, unless

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of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

20 U.S.C. (Supp. V) 1234a(e)) provides:

A final audit determination by the Secretary under subsection (a) of this section with respect to which review has not been requested pursuant to subsection (b) of this section, or a fin[illegible] decision of the Board under this section upholding a final audit determination against a State or a local educational agency shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with the Federal Claims Collection Act of 1966.

[48] Indeed, the court properly based its own jurisdiction on related provisions of the 1978 Amendments (Pet. App. 10a n.12).

doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). See also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 102, 110 (1801).[49] Nothing in the statute itself or in its legislative history suggests that the 1978 recoupment legislation was not intended to apply to pending cases.[50] Accordingly, the relevant inquiry is thus narrowed to whether application of the procedures spelled out in the 1978 Amendments to pending cases would result in a manifest injustice.

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[49] The court of appeals' reliance (Pet. App. 1a-12a) on *Greene* v. *United States*, 376 U.S. 149 (1964), is misplaced. In *Greene*, a Department of the Navy employee brought an action for lost wages. After a favorable administrative determination and while litigation was still pending, the administrative procedures for reimbursement were changed. This Court refused to apply these new, more restrictive procedures for obtaining remuneration to a claimant who had already obtained a final favorable administrative determination under the old procedures. *Id.* at 161. In contrast to Greene's established administrative right to reimbursement, respondents here had no administratively determined right to Title I funds when the new law became effective.

Furthermore, the parties claiming hardship in this case are not individuals, but government entities. Under these circumstances, this Court has been less likely to find an injury justifying an exception to the general rule in favor of applying new law to pending cases. See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 717-719.

Finally, unlike the administrative procedures involved in *Greene*, the Title I amendments reflect congressionally determined national policies. In matters of "great national concerns * * * the court must decide according to existing laws." *United States* v. *Schooner Peggy*, *supra*, 5 U.S. (1 Cranch) at 110. See also *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 719.

[50] Indeed, as discussed above (see pages 34-36, *supra*), the legislative history rather conclusively shows that Congress intended simply to clarify pre-existing recoupment authority; it thus evidently expected the new provision to be applied to all currently pending disputes. See *West Virginia* v. *Secretary of Education*, *supra*, 667 F.2d at 419.

It would not. Application of the 1978 recoupment provisions would neither impair antecedent, vested rights of respondents nor impose new substantive obligations on them; hence, respondents cannot reasonably claim unfairness or hardship. See *Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 720. The only relevant right that existed prior to 1978 is that of the public to have its money spent for authorized purposes in the national interest. Application of the 1978 recoupment provisions to this case serves not to impair, but to vindicate, this right.

Even assuming, contrary to our primary submission, that there was no right to an *administrative* recoupment before the 1978 Amendments, the only effect of the new procedure was merely to change the appropriate tribunal for litigating Title I audit claims from a court of competent jurisdiction to an administrative proceeding before the EAB, with judicial review in the appropriate court of appeals.[51] Even in that case, no antecedent rights of grantees are implicated. Respondents did not have a vested right to any particular procedure for resolving Title I audit disputes.[52] And they certainly did not have

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[51] The court of appeals found it unnecessary to decide whether there was a right of judicial recoupment before the 1978 Amendments (Pet. App. 19a-23a). It is not entirely clear whether respondents claim an absolute right to retain misspent pre-1978 Title I funds (compare Pa. Br. in Opp. 12 with 16-17; N.J. Br. in Opp. 7-8 with 9-10). In any event, the inequity of precluding any method of recovering misspent funds and the existence of audit requirements in the Title I program (see pages 8-9, *supra*) at least show that Congress expected that grantees would be answerable in some forum for violations of the explicit statutory conditions of the grant. See also *Rosado* v. *Wyman*, *supra*, 397 U.S. at 422-423.

[52] Simply changing the tribunal authorized to hear a particular type of case is a remedial or procedural change. *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916); *Montana Power Co.* v. *FPC*, 445 F.2d 739, 747 (D.C.Cir. 1970), cert. denied, 400 U.S. 1013 (1971); *Pennsylvania Power & Light Co.* v. *FPC*, 139 F.2d 445, 453 (3d Cir.), cert. denied, 321 U.S. 798 (1943). It is generally recognized

a vested right to misspend Title I funds. Grants under Title I are limited to particular purposes; states have always received the grants subject to conditions on the use of the funds as specified by the Secretary, acting in accordance with the requirements imposed by the authorizing legislation.

Nor have any unanticipated substantive obligations or increased burdens been imposed on grantees. The 1978 Amendments do not alter the grantees' responsibility to expend Title I grants only in consonance with expressly stated statutory and regulatory conditions, of which they were aware prior to receipt of the funds. Indeed, although New Jersey apparently claims that it was unaware that it might be required to repay improperly expended Title I funds before the 1978 Amendments were enacted (Br. in Opp. 9-10), in fact New Jersey, as well as 25 other states and the District of Columbia, paid back misspent Title I funds prior to 1978 (127 Cong. Rec. S5428-5429 (daily ed. May 21, 1981)).[53] Those repayments strongly suggest that the states generally, and New Jersey in particular, understood clearly the conditions under which they received the Title I grants and their

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that "statutory changes that are procedural or remedial in nature apply retroactively." *United States* v. *Vanella*, 619 F.2d 384, 386 (5th Cir. 1980); see *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85, 93-94 (D.C.Cir. 1980); *Koger* v. *Ball*, 497 F.2d 702, 706 (4th Cir. 1974); *United States* v. *Haughton*, 413 F.2d 736, 738 (9th Cir. 1969). The rationale for this rule is that retroactive changes in enforcement methods, in contrast to retroactive changes in principles of liability, do not transform a legal act into an illegal act or otherwise alter the legal expectations upon which a party based his prior conduct. Thus, the potential for unfairness in retroactive application of procedures or remedies is small. Cf. *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977), quoting *Beazell* v. *Ohio*, 269 U.S. 167, 171 (1925) (Ex Post Facto Clause does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance").

[53] The Department of Education informs us that some of these repayments were made after 1978. New Jersey has made repayments both before and after 1978.

obligation to return funds not expended in accordance with those conditions.

Nothing in this Court's decision in *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is inconsistent with our submission here. In *Pennhurst*, the Court concluded that 42 U.S.C. 6010 does not provide the mentally retarded with a right to treatment in the least restrictive environment. The Court found that the language of Section 6010 was too ambiguous to be read as imposing additional affirmative financial obligations on states receiving grant-in-aid funds under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. 6000 *et seq.* (451 U.S. at 25). There is no claim here that respondents were unaware, when they received the relevant Title I grants, of the substantive conditions that the audits disclosed had been violated. Thus, there is no attempt here, unlike in *Pennhurst*, to reinterpret the obligations the states undertook to perform when they accepted the grants. The Secretary is not trying to impose on any state a financial burden unanticipated when the grant was accepted. Instead, respondents, having received a grant of federal funds and expended it for purposes not contemplated in the award, seek unjustly to enrich themselves at the expense of the grant program by avoiding the repayment of the misspent funds. The question, then, is simply whether all the procedural details by which the Secretary may assure compliance with the agreed conditions of the grant must also be spelled out explicitly at the time the grant is accepted.

The imposition of such a requirement would be inconsistent with the settled principle that when Congress creates a statutory right, the existence of appropriate remedies to enforce that right will be presumed in the absence of a clear indication of a contrary congressional intent. *Texas & N.O.R.R.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548, 569-570 (1930); *Sulli-*

van v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *United States* v. *Wurts*, *supra*, 303 U.S. at 416. Moreover, the practical effect of requiring precise statutory definition of the details of agency enforcement mechanisms would be to impede the ability of Congress to delegate authority to administrative agencies, and would seriously impair the flexibility necessary for agencies to enforce the legislation committed to them. See, *e.g.*, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398 (1940); I K. Davis, *Administrative Law Treatise* § 2.05 (2d ed. 1979).[54]

In sum, we submit that the "overarching principle of *Pennhurst*" (Pet. App. 14a) is the concept of fairness. In *Pennhurst*, that principle precluded requiring the states to accept additional conditions not contained in the original grants; in this case, the same concept of fairness precludes permitting respondents to ignore the conditions that *were* contained in the original grants. It is hardly unfair to impose on respondents the obligation to account to the Secretary for the expenditure of federal funds pursuant to the conditions to which they agreed, and to repay those funds to which they were not entitled. To the contrary, allowing respondents to retain the large sums of misspent funds would be unfair to the intended beneficiaries of the Title I program and to the taxpayers whose monies have been diverted from their intended purposes. These latter interests are as deserving of protection here as were the interests of the grantees in *Pennhurst*.

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[54] In recognition of the need for administrative flexibility, a regulation promulgated or action taken pursuant to a congressional delegation of authority like that in 20 U.S.C. 242(b), which authorizes the Secretary to "make such regulations and perform such other functions as he finds necessary to carry out the provisions of this chapter," will be sustained so long as it is "reasonably related to the purposes of the enabling legislation." *Mourning* v. *Family Publications Service Inc.*, 411 U.S. 356, 369 (1973), quoting *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-281 (1966). If the court of appeals had applied this test, the Secretary's administrative recoupment procedure would clearly have been upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES AND REGULATIONS INVOLVED

I. Federal Claims Collection Act.

31 U.S.C. 952-953 provides in pertinent part:

952. Collection and compromise.

(a) The head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, shall attempt collection of all claims of the United States for money or property arising out of the activities of, or referred to, his agency.

(b) With respect to such claims of the United States that have not been referred to another agency, including the General Accounting Office, for further collection action and that do not exceed $20,000, exclusive of interest, the head of an agency or his designee, pursuant to regulations prescribed by him and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General, may (1) compromise any such claim, or (2) cause collection action on any such claim to be terminated or suspended where it appears that no person liable on the claim has the present or prospective financial ability to pay any significant sum thereon or that the cost of collecting the claim is likely to exceed the amount of recovery.

* * *

* * * *

953. Existing agency authority to litigate, settle, compromise, or close claims

Nothing in this chapter shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims.

II. Federal Claims Collection Standards.

4 C.F.R. Parts 102-105 provide in pertinent part:

102.1 Aggressive agency collection action.

The head of an agency or his designee shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of, or referred to, his agency in accordance with the standards set forth in this chapter. * * *

102.2 Demand for payment.

Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. In the initial notification, the debtor should be informed of the basis for the indebtedness, the applicable requirements or policies for charging interest and reporting delinquent debts to commercial credit bureaus, and the date by which the payment is to be made (date due). The date due should be specified and, normally, should be not more than 30 days from the date of the initial notification. Three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand would be futile and the debtor's response does not require rebuttal. Further exceptions may be made where it is necessary to protect the Government's interests (e.g., the statute of limitations (28 U.S.C. 2415). Agencies should respond promptly to communications from the debtor. Agencies should advise debtors who dispute the debt to furnish available evidence to support their contentions.

102.3 Collection by offset.

(a) Collections by offset will be undertaken administratively in accordance with these standards and implementing regulations established by the head of each agency on claims which are liquidated or certain in amount in every instance in which this is feasible. Collections by offset from persons receiving pay or compensation from the Federal Government shall be effected over a period during which such pay or compensation is to be received. See 5 U.S.C. 5514.

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102.17 Additional administrative collection action.

Nothing contained in this chapter is intended to preclude the utilization of any other administrative remedy which may be available.

105.1 Prompt referral.

Claims on which collection action has been taken in accordance with Part 102 of this chapter and which cannot be compromised, or on which collection action cannot be suspended or terminated, in accordance with Parts 103 and 104 of this chapter, will be referred to the General Accounting Office in accordance with R.S. 236, as amended, 31 U.S.C. 71, or to the Department of Justice, if the agency concerned has been granted an exception from referrals to the General Accounting Office. Such referrals should be made as early as possible consistent with aggressive agency collection action and the observance of the regulations contained in this chapter and in any event well within the time limited for bringing a timely suit against the debtor.

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105.4 Report of prior collection actions.

A checklist or brief summary of the actions previously taken to collect or compromise a claim will be

forwarded with the claim upon its referral to the General Accounting Office or to the Department of Justice. If any of the administrative collection actions enumerated in Part 102 of this chapter have been omitted, the reason for their omission will be given with the referral. The General Accounting Office and the Department of Justice may return or retain claims at their option when there is insufficient justification for the omission of one or more of the administrative collection actions enumerated in Part 102 of this chapter.

III. General Education Provisions Act.

20 U.S.C. (Supp. V) 1226a-1 [1] provides:

> Payments pursuant to grants or contracts under any applicable program may be made in installments, and in advance or by way of reimbursement, with necessary adjustments on account of overpayments or underpayments, as the Secretary may determine.

20 U.S.C. (Supp. V) 1234a provides in pertinent part:

> (a) Final audit determination; written notice to State or local educational agency
>
> Whenever the Secretary determines that an expenditure not allowable under a program listed in section 1232d(a) of this title, or conducted under title VI and title VII of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 3191 et seq., 3221 et seq.] or under the Emergency School Aid Act [20 U.S.C. 3191 et seq.] has been made by a State or by a local educational agency, or that a State or local educational agency has otherwise failed

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[1] The same provision originally appeared in 20 U.S.C. (1976 ed.) 1232d.

to discharge its obligation to account for funds under any such program, the Secretary shall give any such State or local educational agency written notice of a final audit determination, and he shall at the same time notify such State or agency of its right to have such determination reviewed by the Board.

(b) Application for review; * * *

A State or a local educational agency that has received written notice of a final audit determination and that desires to have such determination reviewed by the Board shall submit to the Board an application for review not later than thirty days after receipt of notification of the final audit determination. * * * Unless the Board determines that a final audit determination lacks sufficient detail, the burden shall be upon the State or local educational agency to demonstrate the allowability of expenditures disallowed in the final audit determination.

(c) Collection of amount owing to await final decision

When a State or a local educational agency has submitted an application for review with respect to a final audit determination, no action shall be taken by the Secretary to collect the amount determined to be owing until the Board has issued a final decision upholding the audit determination as to all or any part of such amount. * * *

(d) Finality

A decision of the Board with respect to an application for review under this section shall become final unless within sixty days following receipt by the State or by the local educational agency of written notice of the decision—

(1) the Secretary for good cause shown, modifies or sets aside the decision, in whole or in

part, in which case the decision shall become final sixty days after such action by the Secretary, or

(2) the State or the local educational agency files a petition for judicial review as provided in section 1234d of this title.

(e) Establishment of amount owing

A final audit determination by the Secretary under subsection (a) of this section with respect to which review has not been requested pursuant to subsection (b) of this section, or a final decision of the Board under this section upholding a final audit determination against a State or local educational agency shall establish the amount of the audit determination as a claim of the United States which the State or the local educational agency shall be required to pay to the United States and which may be collected by the Secretary in accordance with the Federal Claims Collection Act of 1966 [31 U.S.C. 951 et seq.].

* * * * *

(g) Five-year limitation period

No State and no local educational agency shall be liable to refund any amount expended under an applicable program which is determined to be unauthorized by law if that expenditure was made more than five years before that State or local educational agency is given the notice required by subsection (a) of this section.

20 U.S.C. (Supp. V) 2835 provides:

(a) Auditing

The Office of Inspector General of the Department of Education shall make provision for audits of grants made under this subchapter to determine, at a minimum, the fiscal integrity of grant or subgrant financial transactions and reports, and the compliance

with applicable statutes, regulations, and terms and conditions of the grant or subgrant.

(b) Audit resolution and repayment

The Secretary shall adopt procedures to assure timely and appropriate resolution of audit findings and recommendations arising out of audits provided for in subsection (a) of this section. Such procedures shall include timetables for each step of the audit resolution process and an audit appeals process. Where, under such procedures, the audit resolution process requires the repayment of Federal funds which were misspent or misapplied, the Secretary shall require the repayment of the amount of funds under this subchapter which have been finally determined through the audit resolution process to have been misspent or misapplied. Such repayment may be made from funds derived from non-Federal sources or from Federal funds no accountability for which is required to the Federal Government. Such repayments may be made in either a single payment or in installment payments over a period not to exceed three years.

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